

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFFREY D. WIRTHS

Claimant

VS.

JOY MASONRY, INC.

Respondent

AND

CONTINENTAL WESTERN INSURANCE COMPANY)

Insurance Carrier

Docket No. 1,016,544

ORDER

Respondent and its insurance carrier (respondent) appealed the May 25, 2004 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant alleges he injured his low back and left arm while helping coworkers move a block saw on April 2, 2004. In the May 25, 2004 Order, Judge Clark granted claimant's request for both medical and temporary total disability benefits.

Respondent contends Judge Clark erred. Respondent argues claimant failed to prove that he injured his back working for respondent and also failed to provide the company with timely notice of the accidental injury. In addition, respondent argues that claimant should be barred from receiving workers compensation benefits as claimant failed to disclose a prior back injury when he was hired by the company. Accordingly, respondent requests the Board to reverse the May 25, 2004 Order.

Conversely, claimant argues the Board should affirm the preliminary hearing Order.

The issues before the Board on this appeal are:

1. Did claimant injure or aggravate his back working for the respondent?
2. If so, did respondent have timely notice of the accident or injury?

3. Should a worker be barred from receiving workers compensation benefits for failing to disclose a previous work-related injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes that the May 25, 2004 preliminary hearing Order should be affirmed. The Board agrees with the Judge's finding that claimant injured his back while working for respondent on April 2, 2004. Moreover, the Board also agrees with the Judge that respondent had timely notice of the accidental injury.

Claimant testified that he slipped and hurt his back while moving a heavy block saw on April 2, 2004. At the time of the accident, claimant was employed by respondent as a bricklayers apprentice and was moving the saw as directed by one of respondent's journeyman masons, Greg Marler. Claimant also indicated he promptly advised both Greg Marler and Randall Joy, the foreman at the job site, that he had hurt his back. The afternoon of the incident, claimant left the job site to see his chiropractor. Claimant testified he did not return to work that afternoon but, instead, returned to work on the following Monday, at which time he gave Randall Joy a note from the chiropractor to verify the visit. Claimant then continued to work for respondent until going on strike.

The Judge found claimant's testimony credible. As the Judge observed both claimant and Randall Joy testify, the Judge had the opportunity to assess their demeanor and gauge their credibility. Judge Clark accepted claimant's testimony as truthful and the Board agrees. Accordingly, the Board affirms the Judge's finding and conclusion that claimant injured or aggravated his back in an accident arising out of and in the course of employment with the respondent.

Randall Joy admits he had notice of the accident by April 15, 2004. In general, the Act provides that a worker has 10 days to provide an employer notice of an accidental injury.¹ And in counting those 10 days, weekends are excluded.² Excluding weekends, notice to the respondent by April 15, 2004, is within 10 days of the Friday, April 2, 2004 accident. Nonetheless, claimant's testimony is credible that he advised Randall Joy about injuring his back on the date of accident.

¹ K.S.A. 44-520.

² See *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996); *Hicks v. Wheatlands Health Care Center*, No. 251,804, 2000 WL 1134456 (Kan. WCAB July 10, 2000).

Claimant testified that he had previously injured his low back and surgery had been recommended. But, according to claimant, his back symptoms had resolved and he had been working as an apprentice mason for two years without any problems.

Respondent argues claimant should be barred from receiving workers compensation benefits because he failed to disclose material information that he had sustained an earlier low back injury. The Board disagrees. The failure to inform an employer about a prior injury is not a defense to a claim for workers compensation benefits as the Workers Compensation Act is self-contained and does not so provide. Conversely, the Act provides that awards may be reduced by the amount of preexisting functional impairment when there is an aggravation of a preexisting condition.³ And awards may be reduced when a prior disability contributes to the overall disability from a later injury.⁴

WHEREFORE, the Board affirms the May 25, 2004 preliminary hearing Order.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
James B. Biggs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-501(c).

⁴ K.S.A. 44-510a.